IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR

WEDNESDAY, THE 20TH JUNE 2007 / 30TH JYAISHTA 1929

WP(C).No. 18740 of 2007(E)

PETITIONER:

M/S. MALABAR FOOD PRODUCTS,
CHALIKKAVATTOM, ERNAKULAM, REP. BY ITS
MANAGING PARTNER, SRI.KUNCHERIA THOMAS.

BY ADV. SRI.RAJU JOSEPH

RESPONDENTS:
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1. THE COMMISSIONER OF COMMERCIAL TAXES,
THIRUVANANTHAPURAM.

2. THE SALES TAX OFFICER, ERNAKULAM.

BY G.P. SRI.MOHAMMED RAFIQ

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ALONG WITH W.P.(C) NO.17676/2007 ON 20/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.R.

C.N.RAMACHANDRAN NAIR, J.

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W.P.(C) Nos.18740 & 17676 of 2007

.....

Dated this the 20th day of June, 2007.

JUDGMENT

The petitioners engaged in manufacture and sale of squash from various fruits like mango, lemon, orange, pineapple etc., are challenging order issued by the Commissioner of Commercial Taxes (produced as Ext.P1 in W.P. 18740/2007 and as Ext.P2 in W.P. 17676/2007) clarifying that the squash produced and sold by them fall under Entry 71 of Notification SRO 82/2006 issued under Section 6(1)(d) of the Kerala Value Added Tax Act (hereinafter called "the Act"). According to the petitioners, the item namely, squash produced from various fruits and sold by them fall under Entry 84(33) of the Third Schedule to the Act and consequently inclusion of the very same item in entry 71 of the Notification SRO 82/2006 and the clarification issued are illegal and unsustainable. It is an undisputed fact that petitioners are engaged in manufacture and sale of fruit squash which is fruit concentrate in liquid form added with sugar, permitted colours and preservatives. The labels produced in court show that the items are sold in 700 ml. bottles and are not ready to drink products, but being concentrates have to be diluted for drinking. One shade of meaning for

"sqash" given in the Dictionary is "a concentrated drink made of crushed fruit etc.".

2. Government Pleader Sri.Mohammed Rafiq appearing for respondents contended that item 71 of the notification SRO 82/2006 specifically includes fruit squash and fruit syrup. However, I find from entry 71 of the said notification that none of the items referred to in HSN Code NO.2008 are covered by the said entry. On the other hand, items covered under clauses 3 and 4 are fruit juices, vegetable juices, fruit pulp etc. which will fall under HSN Code Numbers 2009 and 2202.90.20. It is pertinent to note that even though the main heading of Entry 71 covers fruit squash, it is not specifically enumerated in any of the sub-entries. In order to synchronise Entry 71 of SRO 82/2006 with entry 84(33) of the Third Schedule, all those items covered by HSN Code No.2008 have to be excluded from the scope of entry 71. Moreover, it is pertinent to note that entry 71 of the notification does not cover any item referred to in HSN Code NO.2008 because the said Code is not mentioned against any of the sub-entries in the notification. In order to solve the controversy, the item has to be identified with the relevant entry in the Schedule to the act or the

notification and therefore, for easy reference the relevant entries are extracted hereunder:

Item 84 of the Third Schedule to the Act	HSN Code
"Meat(other than poultry), fish, sea food, egg, fruits and vegetables processed and preserved	
.....	
.....	
.....	
(33) Fruits, nuts and other edible parts of plants (other than cashew nut roasted, salted or roasted and salted) otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified):	2008

Entry 71 of Notification SRO 82/2006	HSN Code
"71. Non-alcoholic beverages and their powders, concentrates and tablets including (i) aerated water, soda water, mineral water, water sold in sealed containers or pouches (ii) fruit juice, fruit concentrate, fruit squash, fruit syrup and fruit cordial (iii) soft drinks (iv) health drinks of all varieties (v) other non-alcoholic beverages; not falling under any other entry in this List or in any of the Schedules.	
(1) Water not containing added sugar or other sweetening matter	
(a) Mineral water	2201.10.10

(b) Aerated water	2201.10.20
(2) Water containing added sugar or other sweetening matter	
(a) Aerated water	2202.10.10
(b) Lemonade	2202.10.20
(c) Other	2202.10.90
(3) Fruit juices and vegetable juices, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter	2009
(4) Fruit pulp or fruit juice based drinks	2202.90.20
(5) Soft drink concentrates	
(a) Sharbat	2106.90.11
(b) Other	2106.90.19
(6) Beverages containing milk	2202.90.30"

2. In the first place, this court has to go into the scope of authority of the Government to issue Notification under Section 6(1)(d) of the Act which is as follows:

> "6. Levy of tax on sale or purchase of goods:- (1) Every dealer whose total turnover for a year is not less than ten lakhs rupees and every importer or casual trader or agent of a non-resident dealer or dealer in jewellery of gold, silver and platinum group metals or silver articles or contractor or any State Government, Central Government or Government of any Union Territory or any department thereof or any local authority or any autonomous body, whatever be his total turnover for the year,

> shall be liable to pay tax on his sales or purchases of goods as provided in this Act. The liability to pay tax shall be on the taxable turnover,-
> .....
> .....
> .....
>
> (d) in the case of goods not falling under clauses (a) or (c) at the rate of 12.5% at all points of sale of such goods within the State. Government may notify a list of goods taxable at the rate of 12.5%."

From the above it is clear that the Government has no authority to notify any goods as taxable at 12.5%, if the item is covered by clause (a) or (c) of Section 6(1) of the Act. Clause (a) covers goods specified in Third Schedule to the Act. Therefore, if the item manufactured and sold by the petitioner namely, squash made from various fruits fall under Entry 84(33) as claimed by the petitioners, then the inclusion of the same under Item 72 of the notification issued under Section 6(1) of the Act is invalid. Obviously squash is not specifically covered by Entry 84(33) of the Third Schedule to the Act. However, Rules of Interpretation of Schedules to the Act specifically provides as follows:

> "The commodities which are given four digit HSN Number shall include all those commodities coming under that heading of the HSN."

It is seen from Entry 84 of the Third Schedule to the Act that the item falls under HSN Code No.2008. Obviously by virtue of Rule 1 of Clause I of the Rules of Interpretation if the products of petitioners fall under any of the Sub-entries of HSN Code NO.2008 under the Central Excise Tariff Act, the petitioners are entitled to a lower rate of tax of 4% under Entry 84(33) of the Third Schedule to the Act. The heading of Entry 2008 of HSN Code contained in the Central Excise Tariff Act is as follows:

> "Fruits, nuts and other edible parts of plants otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included".

The sub-heading 2008.99.11 to 14 provide for squash made of mango, lemon, orange and pineapple and 2008.99.19 provide for other items which probably means squash made of other fruits. In any case it is clear from the above that squash made of the four specific items of fruits and made of other fruits are squarely covered by HSN Code No.2008. By virtue of Rule 1 of Clause I of the Rules of Interpretation of Schedules to the Act appended to the Act, the entire items covered by HSN Code got included in the Entry to the Schedule. Therefore, the squash items covered by sub-entries of HSN

Code No.2008 referred to above fall under Entry 84(33) of the Third Schedule to the Act. So much so, the Government has no authority to prescribe rate of tax on the above items which are covered by a specific entry 84(33) of the Third Schedule to the Act. In the circumstances, inclusion of squash under item 71 of the Notification SRO 86/2002 is illegal and is declared as unenforceable. The W.Ps. are therefore allowed declaring that various items of fruit squash manufactured by the petitioners are covered by entry 84(33) of the Third Schedule to the VAT Act. Consequently, the impugned clarification issued by the Commissioner is also quashed.

C.N.RAMACHANDRAN NAIR
Judge

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